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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE CROCKETT, JR., individually and in his capacity as a
member of the United States House of Representatives, et al.,

Petitioners,

—v.—

RONALD WILSON REAGAN, individually and in
his capacity as President of the United States, et al.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

QUESTIONS PRESENTED

(1) Whether in circumstances where the President failed to report to Congress pursuant to 50 U.S.C. §1543(a) (1) of the War Powers Resolution, that United States armed forces in El Salvador were introduced into hostilities or into situations of imminent hostilities and where such armed forces have remained in El Salvador for over sixty-two days, the Court properly dismissed for reasons of justiciability an action by members of Congress seeking to enforce the reporting and/or mandatory withdrawal provisions of the War Powers Resolution.

(2) Whether the court erred in dismissing the claims of members of Congress that the President violated the War Powers Clause of the Constitution (Art. 1, Sec. 8, cl. 11) by sending United States armed forces into hostilities or into situations of imminent hostilities in El Salvador.

(3) Whether the court erred in dismissing under the equitable discretion doctrine the claims of members of Congress that the President was furnishing military aid to El Salvador in violation of section 502B of the Foreign Assistance Act of 1961 (22 U.S.C. §2304) which prohibits the providing of such aid to governments engaged in a consistent pattern of gross violations of internationally recognized human rights.

LIST OF ALL PARTIES

Petitioners:

George W. Crockett, Jr.
Anthony C. Beilenson

William Clay
Ronald V. Dellums
Mervyn M. Dymally
Robert W. Edgar
Don Edwards
Walter Fauntroy
Thomas Foglietta
Barney Frank
Robert Garcia
William H. Gray III
Tom Harkin
Mickey Leland
Michael E. Lowry
Barbara A. Mikulski
George Miller III
Parren J. Mitchell
James L. Oberstar
Richard L. Ottinger
Gus Savage
Patricia Schroeder
James M. Shannon
Louis Stokes
Theodore S. Weiss

Respondents:

Ronald Wilson Reagan
Caspar W. Weinberger
George Schultz

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OPINIONS BELOW

The opinion of the Court of Appeals dated November 18, 1983, from which this petition is filed, is reported at 720 F.2d 1355 (D.C. Cir. 1983). It is reproduced at Appendix A. The opinion and order of the District Court dated October 4, 1982 is reported at 558 F.Supp. 893 (D.D.C. 1983). It is reproduced at Appendix B.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, Sec. 8, Cl. 11, "The Congress shall have power...to declare war."

STATUTORY PROVISIONS INVOLVED

WAR POWERS RESOLUTION Sec. 2-9,
4(a), 50 U.S.C.A. Sec. 1541-1548.

FOREIGN ASSISTANCE ACT OF 1961 Sec.
102-903, 502(B(a)(2), 903, 22 U.S.C.A.
(1976 Ed.) sec. 2151-2443, 2304(a)(2).

The text of the Statutory Provisions
involved is set forth in Appendix C at
A47.

STATEMENT OF THE CASE

(a) The Reasons For Dismissal of
Plaintiffs Claims

This suit by twenty-nine members of
Congress seeks to enforce the reporting
and termination requirements of the War
Powers Resolution (hereinafter "WPR"), 50
U.S.C. §§1541-1548. The Resolution
requires the President to report to
Congress whenever he has introduced
United States armed forces into
hostilities or into situations where
imminent involvement in hostilities is
clearly indicated by the circumstances.
Whenever he has reported or is required
to do so by the circumstances, United
States armed forces must be withdrawn

within sixty-two days unless Congress has given specific authorization for the forces to remain. 50 U.S.C. 1544(b). (App. at A50.)

Plaintiffs charge that United States armed forces have been introduced into El Salvador in circumstances that required the President to report pursuant to the WPR. This suit seeks to enforce the reporting and termination requirements of that statute.

In a related claim plaintiffs assert that the facts which trigger the WPR also constitute a violation of the War Powers Clause. As Congress has not assented to the employment of United States armed forces in El Salvador, those forces must be withdrawn.

Finally, plaintiffs challenge continued military aid to El Salvador for the reasons that such aid is prohibited by the human rights provisions of the

Foreign Assistance Act of 1961, 22 U.S.C. §2304. These provisions, without any qualifications, prohibit military assistance to governments engaged in a consistent pattern of gross violations of internationally recognized human rights. (App. at A56.)

The Court of Appeals in a brief per curiam opinion affirmed the decision of the District Court dismissing all of plaintiffs claims. It dismissed the WPR claims and the claims under the Foreign Assistance Act "for the reasons stated by the District Court." 720 F.2d 1355, 1357 (D.C. Cir. 1983). (App. at A1.) For this reason, the discussion which follows concerns the opinion of the District Court.

The District Court held that the question presented under the WPR belongs "to the category [of questions] characterized by a lack of judicially

discoverable and manageable standards for resolution," (App. at A21.) and that "in its present posture [the case] is non-justiciable because of the nature of the factfinding that would be required..." (App. at A14.)

Although dismissing "this case in its current posture", (App. Id.) the court did not hold that all suits alleging violations of the WPR were non-justiciable:

The Court disagrees with defendants that this is the type of political question which involves potential judicial interference with executive discretion in the foreign affairs field. Plaintiffs do not seek relief that would dictate foreign policy but rather to enforce existing law concerning procedures for decision-making. Moreover, the issue here is not a political question simply because it involves the apportionment of power between the executive and legislative branches. The duty of courts to decide such questions has been repeatedly reaffirmed by the Supreme Court.

(App. at A21-22, emphasis added.)

Rather, the court concluded that it was not competent to determine the facts regarding United States troop involvement in El Salvador. This was despite plaintiffs' detailed allegations, based primarily upon Government admissions, that United States Armed Forces were in situations of actual or imminent hostilities. The court pointed out that "if plaintiffs' allegations are correct, the executive branch does not merely have a different view of the application of the WPR to the facts, but also is distorting the reality of our involvement in El Salvador." (App. at A19.) But instead of accepting plaintiffs' facts, as is required in deciding a motion to dismiss, the court relied upon affidavits submitted by the Government and reached the conclusion that because of conflicting facts, and the court's claimed inability to resolve the

conflict, it could not proceed. At no point were plaintiffs permitted to prove their case.

The court addressed the relief it could have given, had it not dismissed the action. It held that a court could not order troop withdrawal when the President had failed to file the required report within 48 hours of the date of introduction of United States Armed Forces into situations of hostilities or imminent hostilities. But it also held that it could order that such a report be filed "or, alternatively, withdrawal 60 days after a report was filed or required to be filed by a court or Congress." (App. at A34-35.)

The court did not reach the other asserted bases for dismissal which included standing, equitable discretion and lack of a private right of action. It concluded its opinion on the WPR with

an assertion of the court's power to decide such disputes:

As already stated, the Court does not decide that all disputes under the War Powers Resolution would be inappropriate for judicial resolution.

(App. at A39.)

The court dealt with plaintiffs' claims under the human rights statutes quite differently. While admitting that plaintiffs' claims of gross violations of human rights by the Salvadoran government "are, at a minimum, disturbing", the court found that Congress had "expressed approval of the aid in question" and refused to look behind the President's certification that the human rights situation was improving:

The claim under the Foreign Assistance Act differs significantly from that under the War Powers Resolution, which raises a constitutional question of Presidential usurpation of congressional warmaking power. In addition, the Resolution contains a specific provision that legislation cannot authorize Presidential action subject to the WPR unless it

specifically states that it is authorization for the purposes of the WPR. Here there is no such restraint, and, indeed the Congress has expressed its approval of the aid in question.

(App. at A44-45.)

On this basis the Court dismissed the human rights claim under the doctrine of equitable discretion.

At the time of the Court's decision the International Security and Development Act of 1981 was still law. This Act required certifications for continued military aid to El Salvador. That Act has expired and, now, the Foreign Assistance Act's prohibition on military aid governs. Under these circumstances the doctrine of equitable discretion seems especially inappropriate.

(b) The Facts of the WPR and War Powers Clause Claims

The Complaint sets forth details of the involvement of United States Armed

Forces in El Salvador. (J.A. 8-10.¹) A United States official has stated that the country is "torn by violence" and that "no place is totally safe". (J.A. 5.) Attacks by the Farabundo Marti National Liberation Front (hereinafter "FMLN") occur everywhere. The Complaint alleged that fighting is occurring in three provinces and there are frequent attacks on bases where United States Armed Forces are stationed. Recently, the FMLN seized the important town of Berlin and a United States soldier was a casualty of that battle.²

The complaint details the functions of 56 United States Armed Forces personnel in El Salvador. They "are involved

¹ J.A. refers to the Joint Appendix filed in the D.C. Circuit.

² New York Times, February 27, 1983 at A1,8; New York Times, March 1, 1983 at A1,10.

in two operational and planning assistance teams designed to prosecute the war" and are assigned to "coordinate planning and operations among the five regional commands of the junta and its armed forces." Other United States Armed Forces personnel are counter-insurgency specialists distributed throughout the country where some of the worst fighting occurs and they "advise and coordinate the Junta's armed forces in respect to particular missions and counterinsurgency techniques." (J.A. 9.)

The complaint alleged that United States armed forces have been subjected to armed attacks³, suffered casualties⁴,

³For example, "on April 4, 1981, 100 armed personnel, part of the military forces of the FMLN, attacked the San Salvador air base housing the United States Military Advisers involved in the helicopter 'counter-insurgency program'." (J.A. 10.)

(Footnote Continued)

been seen fighting side by side with Salvadoran government troops⁵, filmed

(Footnote Continued)

⁴On February 2, 1983 the United States admitted that a United States soldier suffered a leg wound from ground fire during a helicopter mission. He was one of five United States soldiers accompanying Salvadoran personnel aboard two helicopters engaged in a combat mission intended to make direct contact with a Salvadoran unit on a tactical operation. The second helicopter drew fire as well. (Washington Post, Feb. 4, 1983 at A1.)

⁵In June 1982, ten United States soldiers were reported to be taking part in combat operations along the Lempa River, an area of persistent fighting about 45 miles southeast of San Salvador. The report stated that personnel from the United States Armed Forces were fighting "side-by-side" with Salvadoran government troops. The United States Forces were wearing combat fatigues, carrying M-16 rifles and firing 51 mm mortars against a rebel base. (J.A. 743.)

carrying grenades and M-16 rifles⁶, and have been present during major attacks⁷.

A report by the Comptroller General on the "Applicability of Certain United States Laws That Pertain To U.S. Military Involvement In El Salvador" issued in July 1982, prior to the February 1983 United States casualty, points out that United States military personnel are drawing special "hostile fire pay". (J.A. 746.) To receive such "hostile

⁶On February 12, 1982, the day this case was argued in the District Court, a crew from Cable News Network videotaped three United States military "advisers" carrying M-16 rifles and M-79 grenades in a guerilla-contested area in the far eastern portion of the country.

⁷In January 1982, the FMLN attacked Ilopango, the main airbase of the Salvadoran air force, located close to San Salvador. Nearly half of the helicopter fleet was crippled and at a time when United States military advisers were on the base. (Report by the Comptroller General, GAO/ID-82-53, at 21, July 27, 1982.

fire pay" a soldier must sign a monthly statement saying: "I was subjected to hostile fire" and the approving officer must certify that the soldier "was subjected to small arms fire or he was close enough to the trajectory, point of impact or explosion of hostile ordnance so that he was in danger of being wounded, injured or killed." (J.A. 746.)

The Report states that the Pentagon initially designated all of El Salvador as a "hostile fire zone", which would have made unnecessary monthly reports by each soldier. This tentative ruling was, however, reversed "for policy reasons".

These facts, which the defendants had no legal right to contest in their motion to dismiss, clearly established that the WPR was triggered.

(c) The Human Rights Violations

Since January, 1980 the El Salvadoran government and its armed

forces and security forces have been responsible for the following:

a) Political assassinations by military and security forces of massive numbers of unarmed, innocent civilians including women and children who the Junta considers to be political dissidents;

b) The toleration, if not encouragement, of various non-governmental death squads who engage in political assassinations;

c) Arbitrary arrests and cruel and inhuman punishment and imprisonment;

d) Disappearances of persons previously in the custody of armed or security forces; and

e) Torture.

The evidence establishing these various categories of the denial of human rights by the government of El Salvador and the armed and security forces has

been consistent and has been emanating from many internationally-recognized independent groups which are not involved in the conflicts in which the government of El Salvador and the FMLN are engaged. Some of the evidence is the following:

For example, according to the Legal Department of the Archdiocese of San Salvador, 80% of the 5,303 assassinations which occurred from January 1, 1980 to September 28, 1980, were committed by the National Army and the Military Corps of National Security including the National Guard, the National Police, and the Rural Police. (See Report of the Legal Department of the Archdiocese, dated October 1, 1980, hereinafter "Archdiocese Legal Department Report", J.A. 47.)

Since October, 1979, according to Amnesty International, 35,000 Salvadorans are estimated to have died as a result of political violence, and government forces

are implicated in at least 6,000 of these deaths; 3,300 of these were peasants.

(A.I./U.S.A. Testimony, March 1981, J.A. 41.)

On May 14 and 15, 1980, hundreds of peasants, including women and children, were killed by army and National Guard units in Rio Sumpul, which is near the Honduran border. Amnesty International received reports of the massacre from priests at the nearby town of Santa Rosa de Copan in Honduras. (Amnesty International Report dated August 11, 1980, J.A. 47.)

One of the consequences of the civil war in El Salvador is a large number of refugees, estimated by the 1980 Report of the U.S. State Department at 62,000.

(U.S. State Dept., Country Reports on Human Rights Practices, February 1981). Many of such refugees flee to neighboring Honduras. Even refugees who have managed

to cross the border into Honduras are not safe. Amnesty International reports that Salvadoran units cross the border to attack refugees in Honduras. (Amnesty International Report dated January 22, 1980, J.A. 58.)

The killing of large numbers of people, as set forth above, has also extended to churchpeople who have shown sympathy for downtrodden Salvadorans. On May 24, 1980, Archbishop Oscar Arnulfo Romero of the Roman Catholic Church of El Salvador was assassinated while celebrating mass at his cathedral. When 80,000 people attended the funeral of the Archbishop, government attacks on the crowd resulted in the death of 40 people. In addition, a priest was killed in November and four American missionaries were murdered in December. (Amnesty International Reports dated 12/4/80 and

12/5/80, J.A. 59.) Union leaders⁸, teachers⁹, and journalists¹⁰ have been

⁸For documentation of murders, abductions, and other uses of force against those in El Salvador seeking to form unions see, Wipfler, "El Salvador: Reform as Cover for Repression," Christianity in Crisis, Vol. 40, No. 8, May 12, 1980 (J.A. 66); Archdiocese Legal Department Report, (J.A. 27); Amnesty International Report dated 8/27/80 (J.A. 81); Amnesty International Annual Report (J.A. 74).

⁹According to the Report of the Legal Department of the Archdiocese, 84 teachers from the National Association of Salvadoran Teachers were seized and killed in 1980 and 21 were removed from their classrooms in front of their students. (Archdiocese Legal Department Report, at p. 5, J.A. 27, Statement by Amnesty International on the Occasion of the Tenth Regular Session of the General Assembly of the Organization of American States, 19-28 November 1980, J.A. 82.)

¹⁰In July, the editor and the photographer of the opposition newspaper La Cronica were abducted and found dead with signs of torture. On January 15, 1980, staff members of the Salvadoran newspaper El Independiente were abducted and the paper was forced to close. In addition, the radio station of the Catholic Church was closed down by the government. (A.I. Report, 2/2/81, J.A. (Footnote Continued)

designated subjects for repression in El Salvador.

The Annual Report of the Inter-American Commission on Human Rights of the Organization of American States, 1979-1980 (J.A. 87) in referring to the mass killings in El Salvador, states:

The Inter-American Commission on Human Rights is particularly concerned over the relative passivity of the government as regards certain armed groups which still maintain ties with former members of security agencies and of the dissolved organization ORDEN which are apparently responsible for hundreds of killings, and over the absence of adequate, effective investigation of such crimes by the authorities.

On December 15, 1980, the United Nations General Assembly passed Resolution 35/192 which, in acknowledging the grave human rights violations in El Salvador, called upon "Governments to

(Footnote Continued)
61, A.I./U.S.A. Testimony, March 1981, J.A. 38.)

refrain from the supplying of arms and other military assistance in the current circumstances." (J.A. 101.)

Notwithstanding the foregoing, the defendants have and are giving extensive military assistance to the government of El Salvador and its military forces.

REASONS FOR GRANTING THE WRIT

- (a) The War Powers Resolution and War Powers Clause of the Constitution

This case involves the power to commit the country to war, a power which, as Abraham Lincoln said, were it possessed by Presidents alone, would place them "where kings once stood."¹¹ No previous challenge to presidential warmaking power has involved a special statute designed to prevent war by presidential fiat and designed to protect

¹¹A. Schlesinger, Jr., The Imperial Presidency, at 187 (1973).

the constitutional power of Congress to participate in the decision to commit the country to war. A violation of the WPR is also a violation of Congress' power to declare war under Article I, §8, Clause 11 of the U.S. Constitution. Only to the extent that the Chief Executive follows the prescriptions of the WPR, will Congress have succeeded in recouping its constitutional prerogatives.

Unfortunately, the President has failed to follow the prescriptions of the WPR not only with regard to El Salvador, but in every situation where it has been applicable. The President takes the position, and did so in the Court of Appeals, that the Resolution invades his Constitutional power as Commander-in-Chief. No President has ever officially reported under the Act; President Reagan pointedly refrains from acknowledging the applicability of the reporting

requirements, §4(a)(1) of the WPR. See,
e.g., 98th Congress, 1st Sess., Cong.
Rec. S13033 (daily ed. Sept. 28,
1983) (remarks of Sen. Eagleton).

Unless and until this Court rules,
the proscriptions of the WPR will
continue to be ignored with dire
consequences for the country. If the
judiciary also refuses to recognize the
existence of hostilities or imminent
hostilities, which are the circumstances
which trigger the reporting requirement,
Congress is by necessity left with the
burden which both the War Powers Clause
and the War Powers Resolution insist it
should not bear. If the judiciary
refuses to take part, then United States
military involvement, rather than
requiring a declaration of war or
specific congressional authorization,
will be presumed legitimate until
Congress specifically says otherwise.

This is contrary to the intent of both the Framers of the Constitution and the authors of the War Powers Resolution. See, e.g., Cong. Rec., Sept. 28, 1983, at S13034 (statement of Sen. Eagleton, quoting James Madison). Therefore, judicial restraint here cannot be justified on grounds of non-justiciability; such a decision effectively means that the court is ruling on the merits of the underlying constitutional and legal claims, by placing on Congress an unconstitutional and illegal burden. It is imperative that courts not decide the merits on threshold issues of jurisdiction or justiciability. Bell v. Hood, 327 U.S. 678, 681-2 (1946); Miller v. Stanmore, 636 F.2d 986, 992 n.9 d(5th Cir. 1981).¹²

¹²The District Court's decision and
(Footnote Continued)

The WPR requires that the President formally report to Congress within 48 hours:

in any case in which United States Armed Forces are introduced

(Footnote Continued)
affirmance by the Court of Appeals here explicitly reaches the merits in dismissing on justiciability grounds. The court emphasizes that it is not holding all WPR claims non-justiciable, just this one. It suggests that were this the Vietnam War, it would have no problem holding that the War Powers Resolution applies and is enforceable. (App. at A24.) The holding of non-justiciability, then, turns not on the inherent impossibility of judicially interpreting "imminent hostilities", but on the difficulty of interpreting it in this particular case. That finding relies on defendants' arguments on the merits, and itself necessarily goes to the merits, which is inappropriate at the justiciability threshold. See, e.g., Goldwater v. Carter, 617 F.2d 697, 701-2 (D.C. Cir. 1979), judgment vacated on other grounds, 444 U.S. 996 (1979); Riegle v. Federal Open Market Committee, 656 F.2d 873, 877 (D.C. Cir. ____), cert. denied, 454 U.S. 1082 (1981); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) (all three accepting legal theories and well-pleaded facts as true when considering justiciability questions, because such questions concern the jurisdiction of the court and not the merits of the case).

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances...

(50 U.S.C. §1543).

This report is at the very heart of the mechanism for joint decision-making established by the WPR. The report begins the sixty-day period within which troops must be withdrawn in the absence of congressional approval. It shifts the burden of initiating congressional debate away from the congress which is notoriously taxed and sometimes even unwilling to face vital issues or constitutional confrontations and places it squarely on the President. The WPR mandates that the President withdraw the troops no later than 62 days from the date of their

commitment, even if Congress has taken no action.¹³

The WPR defines what is meant by "introduction of United States Armed

¹³As the District Court found on this point:

So that Congress would be informed at the outset of any involvement that could potentially lead to war, the Resolution provides for prior consultation (not at issue here), and early reporting whenever any American troops are introduced into a situation of hostilities, or even imminent hostilities, on the President's initiative and without declaration of war. The President is not to wait until our forces are actually engaged in combat before informing Congress. Further, the automatic cutoff after 60 days was intended to place the burden on the President to seek positive approval from the Congress, rather than to require the Congress positively to disapprove the action, which had proven so politically difficult during the Vietnam War. To give force to congressional power to declare war, Presidential warmaking would not be justified by congressional silence, but only by a congressional initiative to "declare war." (App. at A28-29.)

Forces"¹⁴ and the legislative history sets forth the meanings of the terms "hostilities" and "imminent hostilities".¹⁵

¹⁴This is set forth in §1547(c):

For purposes of this Chapter, the term introduction of United States Armed Forces includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country when such military forces are engaged or there exists an imminent threat that such forces will become engaged in hostilities. See App. at A55.

¹⁵"The word hostilities was substituted for the phrase armed conflict...because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. 'Imminent hostilities' [as used in the Resolution] denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict." H.R. No. 287, 93rd Cong., 1st Sess., reprinted in [1973] U.S. Code Cong. & Ad. News 2346, 2351 (emphasis in original).

Section 1544(b) states that within sixty days "after a report is submitted or is required to be submitted pursuant to Section 1543(a) (1) of this title, whichever is earlier, the President shall terminate any use of the United States Forces with respect to which such report was submitted (or required to be submitted) unless the Congress..." declares war, or has specifically approved continued use of such troops, or has extended the sixty-day period or cannot meet because of an armed attack on the United States.

In any situation where the President is required to report, even if he fails to do so, he is obligated to withdraw all United States armed forces within sixty days, unless Congress takes certain

actions. If Congress does nothing, the troops must be removed.¹⁶

It was precisely this automatic termination requirement that caused President Nixon to veto the Resolution and was the main theme of the supplemental and minority views in the congressional reports.¹⁷

¹⁶As Senator Javits, one of the principal authors of the bill, stated:

The approach taken in the War Powers Bill reverses the situation by placing the burden on the Executive to come to Congress for specific authority. The sponsors of the Bill believe that this provision [the 60 day automatic cutoff] will provide an important national safeguard against creeping involvement or future Vietnam style wars. 119 Cong. Rec. 1400 (1973).

¹⁷The Veto Message complained as follows:

One of its provisions would automatically cut off certain authorities after sixty days unless Congress extended them.

...

(Footnote Continued)

Congress assumed that the President would abide by the War Powers Resolution, that he would not become a lawbreaker, but would terminate the involvement of United States Armed Forces within the statutory period. As stated by Senator Javits:

The thirty-day provision (60 days in the final Resolution) contained in Section 5 assumes that the President will act according to law. No other

(Footnote Continued)

I am particularly disturbed by the fact that certain of the President's constitutional powers as Commander in Chief of the Armed Forces would terminate automatically under the resolution 60 days after they were invoked. No overt Congressional action would be required to cut off these powers. They would disappear automatically unless the Congress extended them. In effect, the Congress is here attempting to increase its policy-making role through a provision which requires it to take absolutely no action at all. (Veto of the War Powers Resolution, J.A. 234).

See also Supplemental View and Minority Views on H.R. No. 93-287, reprinted in [1973] U.S. Code Cong. and Ad. News 2358-2361.

assumption is possible unless we are to discard our whole constitutional system.

119 Cong. Record at 1401 (1973).

The President has not, however, complied with the reporting or termination requirements of the Resolution. Yet the circumstances clearly require him to do so. Administration officials report that the military situation is "discouraging" and request additional "advisers" and substantial increases in aid.¹⁸ United States Armed Forces, contrary to the Administration's initial statements, carry M-16 machine guns and grenades and participate in military operations. At least one known United States casualty

¹⁸ New York Times, February 27, 1983 at A1,8; New York Times, March 1, 1983 at A1,10.

has occurred.¹⁹ The "advisers", although allegedly not at risk, are drawing hostile fire pay. (J.A. 746) The WPR was passed to insure that such a scenario would not unfold without congressional approval. The District Court's dismissal and affirmance by the Court of Appeals has frustrated this purpose and neglected the costly lessons learned in Vietnam.

The district court's refusal to find the facts below is clearly inappropriate in a case held to be inherently justiciable as this case was. The court's refusal was based on a misreading of Baker v. Carr, which never contemplated inability to find facts as the sole criterion for "political question" dismissal, when none of the other criteria apply. Furthermore, the

¹⁹ Washington Post, February 4, 1983 at A1.

facts which the court would have had to find below are no more difficult to ascertain than in many other cases. It could not have been clear to the district court, at the stage at which it rendered its opinion, that plaintiffs could not have produced the evidence needed to support their claim, nor that they could not have done so from readily available witnesses and admissible documentary sources. At the very least, the court was required to afford plaintiffs an opportunity to prove that they could have met their burden of proof, if given the opportunity.

Thus the court, by reaching a wrong or hasty conclusion on an essentially procedural point, frustrated the very purpose of the War Powers Resolution, in the first court test of that extremely important post-Vietnam piece of legislation, and at a time when the parallels

between the early stages of United States involvement in El Salvador and Vietnam are becoming clearer with every front page news story.

This Court must act to restore the balance between the Congress and the President; a balance which Congress attempted to remedy by passage of the WPR. Certiorari should be granted to consider these important questions.

(b) The Human Rights Claim

This case also provides the first test of the human rights provisions of the Foreign Assistance Act of 1961, 22 U.S.C. §2304. This statute prohibits military aid to countries engaged in a consistent pattern of gross violations of human rights. Despite overwhelming evidence that the Government of El Salvador and its security forces are engaged in such a pattern, the United States continues to pour aid into El

Salvador. The District Court's dismissal and Court of Appeals affirmance threatens to make a mockery of Congress' intent to have the United States comply with internationally recognized human rights standards.

In 1974 Congress, acting pursuant to its constitutional power over appropriations and its obligations under the United Nations Charter and various treaties, passed Section 502B of the Foreign Assistance Act of 1961, 22 U.S.C. §2304 (hereinafter, FAA in App. at A56). Section 2304 entitled "Human Rights and Security Assistance", implements the obligations of the United States under the United Nations Charter and other international instruments to promote and encourage increased respect for human rights and fundamental freedoms..." 22 U.S.C. 2304 (a) (1).

The operative language of Section 2304 states that:

(2) Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. 22 U.S.C. §2304(a)(2).²⁰

The Joint Explanatory Statement of the Committee of the Conference stated that this legislation establishes

a legal requirement to deny security assistance to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.

²⁰The statute defines violations of internationally recognized human rights as:

torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, other flagrant denials of the rights to life, liberty, or the security of the person. 22 U.S.C. §2304(d)(1).

(emphasis added) House Conf. Rept. No. 95-1546, reprinted in [1978] U.S. Code Cong. & Ad. News 1833, 1873-1874. The legislation requires the President to withhold security assistance to gross violators of human rights.

The security assistance prohibited by Section 2304(a)(2) is defined to include military assistance, aid from the economic support fund, funds for military education and training, aid for peace-keeping operations, sales of defense articles or services, and extension of credits. 22 U.S.C. §2304(d)(2). Security assistance as so defined is precisely the type of assistance which is being provided to the Government of El Salvador. (J.A. 20, 21.)

Plaintiffs have alleged in their Amended Complaint that the Government of El Salvador is engaged in a consistent pattern of gross violations of human

rights. They have supported this conclusion with detailed factual showings and many pages of documentary materials.

Section 2304(a)(2) does provide a means under which specified types of security assistance can be given to countries despite human rights violations. This exception to the rule is possible if:

[T]he President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance.

22 U.S.C. §2304(a)(2). No such certification has been made.

Plaintiffs requested the Court to end aid to El Salvador because of the violation of Section 502B of the Foreign Assistance Act. That prohibition is absolute. The Court's determination that Congress was required to pass another law to enforce Section 502B was erroneous;

Congress need not be both legislator and sheriff. Without Court enforcement the human rights obligations of the statute are a nullity.

CONCLUSION

For the foregoing reasons, the Court should issue the writ.

Respectfully submitted,

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